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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 52

MYRON WIENER, *Petitioner,*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Claims

REPLY BRIEF FOR THE PETITIONER

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Summary of Reply

The respondent after the ingenuous approach it took in its brief in opposition to the petition for writ of certiorai now submits an 87-page brief (with 152 footnotes and a 201-page statutory appendix) containing many equivocal and incomplete facts*, speculations and misconceptions of principles of law to support the respondent's views of the issues herein. The pleas that prior decisions of this Court and others have determined the issues involved

* e.g. The suggestion (Resp. Br., 7) that "enemy assets" were vested *in* the Alien Property Custodian whereas the assets were vested *by* him and covered into the Treasury (see fn 25, infra). The efforts to suggest (Resp. Br., 50) that religious claims constituted only 2% of all claims, whereas in fact, such claims were the most complex and represented claimed amounts totaling approximately $128,862,161.28 out of total claims of $302,978,287.33 (9th Semi-annual Report, War Claims Commission). The suggestion (Resp. Br., 80, fn 146) that the bulk of the Commission's adjudications were handled by civil service trial examiners whereas neither record nor anything else establishes that the Commission used such examiners or was subject to the Administrative Procedures Act.

herein; that the War Claims Commission's functions were purely executive; that the postulate of executive unity requires the President to possess the power to remove quasi-legislative and quasi-judicial officers unless clearly limited by Congress, are primarily permutations on the old theme[1] that the President possesses as an incident of his office and his express constitutional powers such other inherent, implied and incidental powers as may be necessary to assure the orderly functioning of Government.

The weakness of the respondent's underlying argument is its failure to recognize that the doctrine of separation of powers and the corresponding system of checks and balances were not primarily designed to assure a smoothly functioning and efficient national Government but rather a republican form of government in which no one of these branches would have complete domination of the powers of the other. This fallacy results from respondent's misconception of historical events and the fundamental import of decisions of this Court and its failure to equate the functions and duties Congress delegated to the War Claims Commission in the proper frame of reference. Before demonstrating the foregoing, the petitioner deems it necessary first to reply to the untimely and belated suggestion that *res judicata* and collateral estoppel is applicable to the instant case.

I.

Res Judicata and Collateral Estoppel

The respondent, at this late stage of the proceedings, asks the Court to avoid review of the fundamental constitutional questions involved herein by passing on a collateral question, the determination of which could seriously affect the scope and extent of the jurisdiction of the U. S. Court of Claims in wage and pay cases and the District Courts

[1] Today the theme is entitled, "Foreign Relations power"; a few years ago, it was called "Security" and prior thereto "National Defense" and "General Welfare."

in review and consideration of disputes alleging illegal and improper discharge and removal from office. This request of the respondent should be denied since the issue is without merit and improperly made.

The respondent admitting that "the former judgment *does not operate as a complete bar* to * * * these proceedings [emphasis added] nevertheless urges the application of res judicata and collateral estoppel.[2] If the respondent truly believed that such principles were applicable to the facts in this case (all of which facts were mentioned in the petition for writ of certiorari), it owed a duty to this Court and it was incumbent upon it to have raised and argued the question at the time the petition for writ of certiorari was pending in this Court and to have similarly fully argued the issues in the court below. The rules of this Court require a respondent "* * * to file * * * an opposing brief disclosing *any matter or ground* why the cause should not be reviewed by this court." * * *[3] This the respondent failed to do and now after the granting of the writ of certiorari, the printing of the record, filing of the petitioner's brief and scheduling of the case for argument,[4] attempts in a vague and qualified manner to argue res judicata when even in the court below it "conceded" that prior decisions of that court made it clear that res judicata was not applicable to the instant case.[5]

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[2] Resp. Br., 69.

[3] Supreme Court Rules, 19.

[4] Respondent's time to file its brief expired on September 27, 1957, but its time to file was extended, to October 15, 1957.

[5] In its brief in the Court of Claims (Fn 1, p. 4), respondent stated in part as follows: "In view of this Court's rulings in *Levy* v. *United States* 118 C. Cls. 106 and *O'Brien* v. *United States*, 124 C. Cls. 655, argument has been omitted on defendant's plea of *res judicata*. Concededly, with respect to plaintiff's first action in the nature of *quo warranto* and this suit, the remedy sought and the named parties are different in the technical legal sense. But these distinctions merely reflect the fact that the extraordinary legal remedy invoked in the first action carried with it the remnants of common law technical forms." * * *

This Court has found that a suit against an officer of the United States is not necessarily a suit against the President or the United States,[6] and the United States Court of Claims has consistently held that suits against individual officers of the United States for illegal removal and for restoration to office, are within the exclusive jurisdiction of the United States District Courts and that suits for salary are within the exclusive jurisdiction of the United States Court of Claims and since such suits in the District Court are not against the United States, a judgment obtained in such district court determining the validity of a removal is not res judicata to an action for salary in the United States Court of Claims.[7] The Department of Justice took precisely this position and successfully argued before the Court of Claims that notwithstanding a decision of the United States District Court in favor of a discharged Government employee against the head of the department, the United States could in the suit in the Court of Claims by the *same* employee relitigate the propriety of such discharge since the United States was not a party to the District Court action, which in any event did not possess jurisdiction over the cause of action pending in the Court of Claims.[8]

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[6] *Youngstown Sheet and Tube Corp.* v. *Sawyer*, 343 U. S. 579.

[7] *Levy* v. *United States*, 118 C. Cls. 106; *O'Brien* v. *United States*, 124 C. Cls. 655; *Casman* v. *United States*, 135 C. Cls. 647.

[8] In *O'Brien* v. *United States*, (supra) the Government in its brief (p. 67) argued "The order of the District Court restoring plaintiff to employment in the Navy Department is not res judicata of his right in this Court to recover back pay . . . plaintiff instituted a civil action in United States District Court, entitled *Edward J. O'Brien*, plaintiff v. *Francis P. Matthews*, Secretary of the Navy, defendant, asking restoration of the plaintiff to employment by the Navy.

From the above, it can be seen that as between the District Court action and the present one, obviously not only the parties are different but also the relief sought is different**. Under the precedents noted in the quotation from the *Levy* case, *supra*, therefore, the District Court order is not determinative of the plaintiff's right to recover herein, but this Court may examine for itself in this suit for back pay amounting to over $33,000 the question of the validity of plaintiff's removal in 1945**."

The principle of res judicata is that "* * * a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction * * * cannot be disputed in a subsequent suit *between the same parties or their privies;* and even if the second suit is for a different cause of action, the right question or fact once so determined must as *between the same parties* be taken as conclusive * * *."[*] The facts and circumstances of this case clearly demonstrate that it does not have *all* of the factors necessary to have res judicata apply.

When the nature of the quo warranto proceedings had in United States District Court and the events which occurred in the United States Court of Appeals for the District of Columbia are examined in the light of the basic concepts of res judicata, it becomes clear that there does not exist any basis for respondent's contentions. Title 16, Chapter XVI, District of Columbia Code, authorizes a *quo warranto* proceeding to be instituted by and in the name of the United States upon the relation of a third person (id. Sec. 1601-1602). The request that such suit be instituted in the name of the United States *must* first be made to the Attorney General of the United States and the United States Attorney for the District of Columbia. Upon their refusal to do so, an *interested person* with leave of the District Court may bring the action in the name of the United States (id. Sec. 1603). If we go beyond the clear language of this statute to the common law principles of quo warranto, which the statute leaves in effect, *United States ex rel. Noel* v. *Carmody*, 148 F. 2d 684, the conclusion is inescapable that whatever the role of the United States may have been in the suit, is not that of a defendant.

When the Attorney General and United States Attorney refuse to bring the action, they cannot be compelled to do so but if the relator obtains leave of the District Court,

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[*] *United States* v. *Munsingwear*, 340 U. S. 36.

such law officers cannot prevent the relator from making the United States a party plaintiff, *Respublica* v. *Griffiths*, 2 Dall 112, 1 L. Ed. 311 (1790). It may be only a nominal plaintiff but it is certainly not the party defendant, nor did the proceedings involve a suit against the President. *Newman* v. *United States ex rel. Frizzell*, 238 U. S. 537, or against the three defendant respondents as officials of the United States, *State ex rel. Holloman* v. *Leib*, 125 P. 601, *Rhodes* v. *Love*, 69 S. E. 436. The District Court suit was against the three presidential appointees personally, the writ of quo warranto was directed against them as individuals and the judgment of the District Court would have bound only them and not their successors in office. 44 Am. Jur. 102, 103. Except for establishing the "interest" of the relator, the primary issue was not *his* right to the office but rather that of the incumbents. *People ex rel. Dick* v. *Mosco*, 167 P. 2d 949.

We do not have the situation presented in *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381. There the parties to the second action were the coal company and the National Bituminous Coal Commission and in the first suit the same coal company and Homer Adkins, *Collector of Internal Revenue for the District of Arkansas*. This Court accordingly found that both the Collector and Commission were representatives of the United States and that "* * * there is privity between officers of the same government so that a judgment in a suit between same party and a representative of the United States is res judicata * * *" (id. 402). The circumstance that in the quo warranto proceedings the Department of Justice chose to appear for the three defendants[5] did not, however, make such individuals the representatives of the United States. Certainly none

[5] 5 U.S.C. 306 provides that "The officers of the Department of Justice * * * shall * * * render all services * * * to enable the President * * * and other officers * * * to discharge their respective duties; and shall on behalf of the United States * * * prosecute and defend all suits and proceedings * * * in which the United States or any officer thereof *as such* officer is a party or may be interested * * *."

of the three defendants could not have interposed against the petitioner in the District Court either the counterclaim on which the United States obtained a judgment in the Court of Claims or any other offset or claim the United States might have against the petitioner. The distinction made and principles enunciated by this Court in *Sage* v. *United States*, 250 U. S. 33, apply with equal validity to this case and are the principles on which the Court of Claims and the Department of Justice relied in *O'Brien* v. *United States*, *supra*. The District Court proceedings, therefore, did not nor could it decide rights, questions or facts between the *same* parties as were involved in the court below and res judicata or collateral estoppel is not applicable.

Upon dismissal of the writ of *quo warranto* by the District Court, an appeal[11] was taken by the "plaintiff" therein to the United States Court of Appeals for the District of Columbia. When the issues involved in the appeal became moot because of the abolition of the War Claims Commission, the parties by their respective counsel agreed as appears below[12] to a dismissal of the appeal. Pursuant to

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[11] See Rule 81(a)(2) Federal Rules of Civil Procedure.

[12] AGREEMENT OF DISMISSAL

It is hereby agreed between the parties hereto, inasmuch as the War Claims Commission has been abolished by Reorganization Plan No. 1 of 1954 (19 Fed. Reg. 3985) and this action has become moot, that the above entitled cause be dismissed under Rule 21, and the Clerk is hereby directed to enter the case dismissed, without costs to either party, and that he transmit a certified copy of this agreement to the Clerk of the United States District Court for the District of Columbia.

I. H. Wachtel
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Edward H. Hickey
Edward H. Hickey
Attorney, Department of Justice
Attorney for Appellees

I, JOSEPH W. STEWART, Clerk of the United States Court of Appeals for the District of Columbia Circuit, do certify that the foregoing is a true copy of the original agreement filed August 10, 1954 in the therein entitled cause as the same remains upon the records and files of the said United States Court of Appeals, and that the said case was on August 10, 1954, entered dismissed under Rule 21 in accordance with said agreement.

the Appellate Court's rule, the clerk transmitted a copy of the said agreement to the Clerk of the United States District Court. Implicit in such agreement is the recognition by both parties that the rights and facts in issue in that suit were no longer capable of final determination or conclusiveness (See Restatement, Judgments, Sec. 69(2)). Now the respondent urges that the principles enunciated in *United States* v. *Munsingwear, supra,* are applicable to the instant case.

The facts in *Munsingwear* are so different as to make that case not only distinguishable but inapposite. In *Munsingwear,* the parties in each step of the litigation were the same[13] and were the only ones who could be bound by the decision of the lower and appellate court whereas here none of the parties are the same, except that petitioner acting in a representative capacity for the benefit of the community (*Brown* v. *Truax,* 115 P. 597) was the relator in the District Court. In *Munsingwear,* the District Court had jurisdiction to give full relief to the "Government" for the alleged violation of a regulation (either by way of treble damages or injunctive relief or both) whereas in the quo warranto proceedings, all that the Court could do was find that the President's appointees were usurpers (Title 16, Sec. 1608, D. C. Code), it could not restore the petitioner to his office nor render a judgment for his lost salary.

In *Munsingwear* the appeal was dismissed by order and judgment of the Court upon motion of the respondent; however, in the instant case, the appeal was dismissed by *agreement* of the parties filed with the Clerk of the Court of Appeals and the District Court. To apply the principles enunciated in *Munsingwear* to the totally different facts and circumstances herein is, therefore, unwarranted and would afford to the respondent an opportunity to have the Court pass on a question which could substantially affect the

[13] Except that the successor in office to the original plaintiff was substituted as the party plaintiff.

jurisdiction of the Court of Claims and its established practice and procedure and the practice in the United States District Court to determine employee's rights to office in illegal discharge or removal cases. Such an important question should not be considered on the basis of the posture of this case and the limited discussion contained in this reply or respondent's brief.

II.

The Nature of the President's Power of Removal

The petitioner does not dispute the premise that as to "purely executive officers" the President has been held to posses the unrestrictable power of removal[14]; it does, however, submit that the petitioner is not such a "purely executive officer" but rather an "officer of the United States" performing quasi-legislative and quasi-judicial functions, over whom the President possesses only such degree of concern and control as the Congress may validly grant to him. The respondent would have us believe that there exists in the President the implied unlimited power of removal of "all officers of the United States" appointed by him subject only to constitutional or statutory restrictions with respect to non-executive officers.

Assuming that we understand the meaning and scope of "non-executive officers", the fact is that the Constitution does not contain *any express provisions* restricting the removal of *such non-executive officers* nor does the War Claims Act contain any express provision restricting removal other than the fixing of a term of office and the absence of grounds for removal. But neither does the Constitution nor the statute involved contain any express grant of power to the President to remove either executive or non-executive officers of the United States appointed by

[14] *Humphrey's Ex'r* v. *United States*, 295 U. S. 602, 632.

him. The issue thus remains; how did the President acquire the power to remove "non-executive officers?"

The respondent relies heavily on *some* of the utterances of James Madison; the results of the debate in the First Congress and decisions of this Court to support its premise that the existence of removal power over such *non-executive officers* must be implied from the recognition of the existence of implied unrestrictable power of removal of *purely executive officers* appointed by the President. The authorities do not afford support for this premise of the respondent. Mr. Madison and the members of the First Congress were considering only "high political officers" and the extent to which the Senate could participate in decisions relating to the removal by the President of officers performing duties affecting the performance of the President's constitutional powers. Even before the adoption of the Constitution, Mr. Madison recognized[15] that the "government" is administered by different persons, some * * * holding their offices during pleasure, for a limited period or during good behavior * * *" and that "* * * the tenure of the ministerial offices generally will be a subject of legal regulation conformably to the reasons of the case and the example of the State Consitutions."[16] During the First Congress, Mr. Madison also recognized that there were different kinds of "officers of the United States" when he argued that the Office of Comptroller of the Treasury could not be considered in the same category as the Secretary of State since the Comptroller's office did "partake of a Judiciary quality" warranting a term of office for a fixed period of time.[17]

There can also be no question that Mr. Madison knew that the theory of implied power of removal applied to a

[15] The Federalist, No. 39.

[16] See *Myers* v. *United States*, 272 U. S. 52, 244 dissenting opinion Mr. Justice Brandeis, for an analysis of the provisions of the various State Constitutions in effect at the time Constitution was adopted.

[17] 1 Ann. Cong. 611-614.

limited group of officers after the 1803 decision of this Court in *Marbury* v. *Madison*, 1 Cranch 137. Justice Story and Justice McClean recognized it, and the debates during the Johnson impeachment proceedings were predicated on the limited area to which the doctrine of implied removal power applied. Any thoughts that the concepts and principles enunciated by the First Congress and early decisions of this Court extended the implied power of removal to "non-executive" officers were substantially removed by this Court's decision in *Humphrey's Ex'r.* v. *United States*, *supra*. It is, therefore, sheer sophistry to now argue that history and the decisions of this Court support the view that there is applicable to the instant case, a canon of construction (that the power to appoint carries with it the power to remove); that the Presidential duty to take care that the laws be faithfully executed and a "postulate of executive unity" requires the "presumption" that the President possesses removal power over non-executive officers unless limited by Congress.

The spelling out of an implied power must ordinarily find its justification in the necessity to possess it for the fulfillment or execution of an express power, duty or obligation. What express power, duty or obligation the President possessed with regard to the War Claims Commission, other than the authority to select and nominate has not been demonstrated nor established by the respondent. If the functions and duties of the petitioner were "non-executive" or quasi-legislative and quasi-judicial (or to quote Mr. Madison, "partake of a Judiciary quality"), the President had only such concern or interest therein as Congress allowed or granted. Under the doctrine of separation of powers, he possessed no constitutional prerogatives over such functions; neither was the Commission by statute charged with any duties or obligations affecting the functions and powers of the President. To spell out this vesting of the power of appointment in the

President the Congressional intent or implied power of removal would be contrary to the long line of cases which fix and limit the manner of determining the implied existence or grant of Executive power. Even if we assume that the President had a concern with the functions of the Commission, "* * * The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to have within his power."[18]

III.

The Nature and Character of the Functions of the War Claims Commission

The main thrust of respondent's argument is that the War Claims Commission performed "purely executive functions" because it was neither "an arm of Congress" nor did it exercise any power of the judicial branch, but did perform functions related to the President's foreign relations power. The criteria which we should use in determining whether the Commission is "wholly disconnected from the executive department" are not the minutiae of each function which it was authorized to perform, but whether any of such functions was the "means of carrying into operation legislative or judicial powers."[19] The significant factor is not that the Commission may have exercised any executive function (as distinguished from *executive power* in the constitutional sense) but whether the act or functions it performs were in discharge and effectuation of legislative or judicial powers. For in its broadest sense, each of the three great branches regularly performs acts and functions which in varying degree partake of the quality of the other. The controlling factor is whose "power" is being exercised, and in the case at bar we must

[18] *Myers* v. *United States*, *supra*, dissenting opinion Justice Holmes, p. 177.

[19] 295 U. S. 630.

determine if the Commission discharged and effectuated the powers of the legislative and/or judicial branch, if it did so, it was a quasi-legislative or quasi-judicial body. If it is discharged or effectuated "the executive power" vested in the President, then it had performed executive functions.

It is in this context that the functions of the Commission must be examined to determine whose powers the Congress intended the Commission to discharge or effectuate. It has never been a problem to ascertain the intent or understanding of individual members of the Congress but rather of the Congress as a legislative body. In the instant case we have ample evidence of what some members of Congress said they intended to accomplish but non of this can change the clear and unambiguous language of the Act itself (particularly the opening sentence thereof), the definitive reports of Congressional Committees[20] and of this Court.[21]

Can it be said that an instrumentality is performing an executive function when it is charged with responsibility "* * * to make an inquiry and report with respect to war claims * * *". because "* * * the question of war claims and debts is too complex to be approached by the Congress on a piecemeal basis * * * so that the subject in its entirety must be studied thoroughly before any intelligent action can be taken by Congress * * *."[22] Clearly the investigation called for by Section 8 of the Act was not the discharge or effectuation of the executive power but that of the Congress. The respondent would minimize the importance of this phase of the Commission's functions by suggesting that the report it filed on March 31, 1950 (House Doc. No. 580, 81st Cong. 2nd Sess.) concluded its duties. It ignores the clear statement on pages 2 and 3 thereof, that

[20] House Report No. 976, 80th Cong., 2nd Sess.

[21] *Guessfeldt* v. *McGrath* 342 U. S. 308, 315.

[22] See fn. 20 *supra*.

it was not intended as the full and complete study required by Congress and that a more thorough study would be submitted at a later date. The respondent would give the impression that the subsequent report was merely a gratuitous gesture by the Commission, but even a casual reading of the later report (House Document No. 67, 83rd Cong., 1st Sess.), makes it clear that it is supplementary to, and integrated with, the earlier one. The inescapable fact is that if the Act assigned no other function to the Commission but making the investigation and reports above mentioned, it had performed a function in discharge and effectuation of legislative power requiring it to be "independent of executive control * * * and free to exercise its judgment without the leave or hindrance of any other official or any department of government."

The respondent would also have us believe that the function of the War Claims Commission "was related" to the foreign relations power. It does not make it clear what the words "was related" mean but does suggest that the manner of disposing of monies in the Treasury of the United States acquired through vesting of enemy alien assets and reparations remained a responsibility of and prerogative of the President. The ineluctable conclusion that must be drawn from historical and contemporaneous events is directly to the contrary. The fallacy of the respondent's position is its incorrect interpretation of history and its failure to view in their true light the program and purposes set forth in the Act.

From the first days of the founding of our country to the present day, the Congress has been concerned and confronted with the problem and nature of relief to be afforded to its citizens and nationals who had suffered most from the rigors and ravages of war[23]. During World War II and prior to the ratification of any treaty with Germany

[23] See Supplementary Report of War Claims Commission House Doc. No. 67, 83rd Cong., 1st Sess., p. 64, et seq.

or Japan affecting vested assets or reparations, the Congress became concerned with the problem of war claims and damage and ways of relieving the suffering and damage of its citizens and nationals.[24] Part of the results of this concern was the creation on April 30, 1946 of the Philippine War Damage Commission (50 U. S. C. App. Sec. 1751, et seq.) and the War Claims Commission in 1948. This legislation therefore did not represent a desire to implement treaties not yet in existence or dispose of "enemy assets" (as the respondent suggests) but the expenditure of funds covered *into the Treasury of the United States*[25] for the relief and benefit of those whom the Congress thought should have the benefits of these funds. (Funds which theoretically could have been used for other purposes ordinarily requiring the appropriation of monies obtained from taxes).

Neither at the time such legislation was enacted nor subsequently did any of the treaties signed by this country with the axis powers impose any limitations or restrictions or state what we must or should do with such vested assets or reparations.[26] Even if any such treaty did require the creation of a tribunal or provide the manner in which reparations funds should be disbursed, the responsibility and authority therefor was in the Congress and not the President.[27]

The respondent by inference and quotations taken out of context would like to create the impression, that all the

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[24] See hearings on S. 1322, Subcommittee of Senate Judiciary Committee, 79th Cong., 2nd Sess., April 17, 1946.

[25] 50 U.S.C. App. Sec. 12, 39.

[26] We do not, therefore, have the situation which prompted the creation of the Mixed Claims Commission after World War I.

[27] "* * * The treaty certainly created no tribunal by which these damages were to be adjusted * * *. It rested with Congress to provide one according to treaty stipulation. But when that tribunal was appointed, it derived its whole authority from the law creating it and not from the treaty and Congress had the right to regulate its proceedings and limit its power * * *." *United States* v. *Ferreira*, 13 How 40, 46.

Commission was charged with, was determination of "claims of American citizens against foreign countries" and to pay them out of "alien property funds." But this is likewise contrary to the facts. The Act did not authorize the President to make claims or diplomatic representation to the axis powers on behalf of our citizens or nationals nor did the treaties preserve any right to American citizens or nationals to make further claim against any of the former enemy countries. The funds were assets of the United States, subject to disposition by the will of the Congress, and no citizen had any enforceable claim against it.[28] If Congress had not enacted this legislation creating the right to claim payment and the tribunal to adjudicate such right, there would have been no way for any United States citizen to compel the payment to him of any portion of such funds.[29]

Whenever in the history of our country, citizens petitioned for payment of their "war claims" out of reparations or other funds of the Treasury, it was made to the Congress and not to the President. It was the Congress which possessed sole authority to create the right to make a claim and receive payment and the tribunal to adjudicate them. The determination of the right to receive payment out of "French Spoilation Funds" was ultimately delegated to the United States Court of Claims, 23 Stat. 283, and the deter-

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[28] See, however, Senate Resolution 257, and Report #1466, 83rd Cong., 2nd Sess., and *Blabon et al.* v. *United States*, No. Cong. 5-54, now pending in the United States Court of Claims as to the existence of a cause of action against the United States for waiving the claims its citizens possessed against China.

[29] See *United States* v. *Weld*, 127 U. S. 51, *Williams* v. *Heard*, 140 U. S. 529, holding the United States was under no legal or equitable obligation to pay to its citizens (who had damage claims) the proceeds of "reparations" obtained from Great Britain for such damage to property of American citizens. See Report of War Claims Commission, House Doc. No. 67, 83rd Congress, 1st Sess., for history of Congressional action taken on reparation funds obtained from France in 1801, from Britain following War of 1812, Spanish Spoilation Claims of 1819 and claims following Mexican War of 1848, Civil War, Spanish American War and World War I.

mination of the right to receive payment out of funds received from Great Britain following the Civil War was delegated to a "special court" known as "Court of Commissioners of Alabama Claims", 18 Stat. 245.[30] When the circumstances were such that the provisions of a treaty or executive agreement required the establishment of a body or tribunal which would pass on *claims*, the Congress (and not the President) created the body or tribunal and vested authority to appoint the members (See 3 Stat. 639, 9 Stat. 39, 30 Stat. 1754). Where the treaty required the creation of an international or "mixed" claims commission to "adjudicate" rights of American nationals or citizens *against* a foreign power, as was the case after World War I, it was the Congress which vested the authority to appoint American members thereof and decided how the recommendations of the Mixed Claims Commission were to be implemented and paid.[31]

The petitioner's brief (p. 20) made it quite clear that he was not asserting the exercise of "judicial power" contemplated by Article III of the Constitution, but rather those of a "Legislative Court." (See *Williams* v. *United States*, 289 U. S. 553) Obviously, if the functions assigned to the Commission would constitute it an "inferior court" exercising "judicial power" within the scope of Article III of the Constitution, it could under no circumstances be part of the executive branch and subject to the President's control in view of the language of Section I, Article III, of the Constitution. It is because the War Claims Commission was required to adjudicate *according to law and*

[30] It is significant to note that the members of this tribunal were appointed by the President after Senate confirmation to serve for a fixed period of time without any grant of power to remove for any cause.

[31] The Mixed Claims Commission was established after World War I as the result of the provisions of an Executive Agreement dated August 10, 1922 (42 Stat. 2200) to determine the nature and extent of claims *against* Germany. It was not until Congress enacted the War Claims Act of 1928 (45 Stat. 254) that provision was made for payment of the awards recommended by the Mixed Claims Commission. The War Claims Commission was therefore, *not* analogous to this Mixed Claims Commission.

not executive policy that its function was to discharge and effectuate the judicial power, requiring it under the doctrine of separation of power to be free from control by the President. To argue that the judicial power can be exercised only where there is a controversy between two or more adversaries is to ignore realities.

Judicial power is exercised by courts in matters lacking adversaries or controversy, i.e., naturalization, proceedings for change of name, adoption, lunacy and sanity commission, approval of incorporation of charitable corporations and other ex parte proceedings. The case of *United States* v. *Ferriera, supra*, on which the Government relies so heavily, decided not that there was lacking adversaries or controversy, but rather that an appeal could not lie from a "decision" or "judgment" of a court which was *subject to approval* of the Secretary of the Treasury before it would be honored. (In the instant case, the Secretary of the Treasury had only one function and that was to disburse on certificate of the War Claims Commission). The function of the Commission must be deemed to have discharged or effectuated judicial power, similar to that performed by the United States Court of Claims when it considers, pursuant to 28 U. S. C. 1492 and 2509 claims and other matters referred to it by Congress. Will it be argued that the function of the Court of Claims in rendering judgment against the United States on claims which could not have been litigated if Congress had not provided the right and the forum to do so under the Tucker Act, is not the discharge or effectuation of part of the judicial power. Can it be said that the granting of a right to relief to prisoners of war, civilian internees, and religious organizations (for internment, cruel and inhumane treatment, damage and destruction of property) and the adjudication of these rights is not a discharge or effectuation of similar judicial power simply because the Act provided a thoroughly delineated frame of reference to follow in making adjudications which

were to be *final and conclusive on all questions of law and fact and not subject to review by any other official of the United States or by any court by mandamus or otherwise?* Does this process of adjudication partake less of "a Judiciary quality" than the adjudication of what constitutes a violation of the Internal Revenue laws, illegal exaction of taxes, illegal restraint of trade, monopoly or illegal possession or sale of drugs or any other statutory crime, offense or violation?

If it be concluded that such functions are not part of the judicial power or do not partake of "a Judiciary quality," does it not follow that such functions are an extension of or discharge or effectuation of the legislative power? Is it only to rate-making and regulatory bodies that Congress can validly delegate the performance of its powers? Is the determination of whether a given person falls within a class entitled to receive funds of the United States for relief from war damage, injury or suffering from internment or cruel and inhumane treatment, no longer the discharge or effectuation of legislative power but executive because it is now delegated to an independent body rather than to a committee of Congressmen or Senators? Is such an instrumentality by virtue of the vesting of the power of appointment thereto in the President to be subject to his coercive influence while discharging or effectuating judicial or legislative power?

It is respectfully suggested to the Court that the functions being performed by the Commission were in discharge and effectuation of both judicial and legislative powers; that the functions being performed are not and never were within the scope of the President's constitutional grants of authority. If the executive branch ever possessed any influence over such agencies, it was because Congress *chose* to delegate it to that branch and not because the President possessed constitutional authority to do so. Whether any such action by Congress was a valid delegation

of power need not be decided here. What is at issue is whether *absent* an express grant of authority, the President possessed as part of his executive power or the power to appoint the implied authority to remove the petitioner without cause. To hold that he does, will open the door to encroachment by one branch of government on the other. We do not have here the situation which appeared to have disturbed the late Chief Justice Taft.[32] His concern was that "Congress is getting into the habit of forming boards *who really exercise executive power* * * *" [emphasis added]. We do not have a board which really exercises executive power in the instant case nor in the case of Securities and Exchange Commission, Federal Communications Commission and Federal Power Commission. The Court should re-affirm the power of Congress to create such boards free of executive control and should also confirm, that absent an express grant of authority to remove the President possesses no power to remove quasi-legislative or quasi-judicial officers appointed by him.

CONCLUSION

The War Claims Commission was performing functions which discharged and effectuated legislative and judicial powers. The Act creating the Commission fixed the term of office of the members thereof and did not grant to the President *any* power to remove the petitioner without cause. The President did not by virtue of his executive power or power of appointment, possess the authority to remove without cause, members of this Commission. The petitioner was for all the foregoing reasons illegally removed from office prior to the expiration of his term. It is, therefore, respectfully submitted that the judgment of the court below should be reversed.

[32] See Resp. Br. 36, fn 72

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